EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Dornan	**v**	Maritime Transport Limited

Heard at: Bury St Edmunds (by CVP)

On: 11 and 12 January 2022
04 March 2022 (In Chambers – no parties present)

Before: Employment Judge Laidler

Members: Mr R Allan and Ms L Durrant

Appearances
For the Claimant: Ms C Step-Marsden (Counsel).
For the Respondent: Mr M Wakelin (In-House Solicitor).

RESERVED JUDGMENT

1. The claimant was disabled by virtue of his back condition at the date of dismissal on 31 March 2020.

2. The claimant's dismissal was unfavourable treatment because of something arising in consequence of his disability.

3. The respondent has not shown that that treatment was a proportionate means of achieving a legitimate aim.

4. The remedy to which the claimant will be entitled will be determined by this tribunal at a Remedy Hearing on 26 May 2022 at the **Bury St Edmunds Employment Tribunal, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR.**

REASONS

1. The claimant issued proceedings on 21 July 2020 claiming disability discrimination. There was a case management hearing before Employment Judge Michell on 5 July 2021 when the claims were clarified. An order was made for the claimant's representative to provide further information in connection with the claim of reasonable adjustments. That

claim was subsequently dismissed on withdrawal. What proceeded to this hearing was whether the claimant's dismissal was unfavourable treatment because of something arising in consequence of the claimant's disability contrary to s.15 of the Equality Act 2010.

2. The claimant asserts he is disabled by virtue of a back condition. The respondent does not dispute he has such a condition but does not accept that it amounted to a disability within the meaning of s.6 of the Equality Act 2010. Further it relies upon s.15(2) that it did not know and could not reasonably have been expected to know that he had a disability and therefore argues that s.15 should not apply.

3. The claimant was represented by counsel at this hearing, and she opened on the first morning by seeking to argue that the claimant was advancing a case that he had been disabled from 2011 or alternatively from the date of his operation in 2019. It was put to counsel that although the claimant in his Impact Statement refers to an accident in South Africa as a result of which he had an operation on his back in 2011 there was no evidence of how the condition impacted upon his normal day to day activities from that date until the date of his operation in 2019. It was submitted on behalf of the claimant that it was clear from the papers and the medical evidence that he had had serious operations.

4. The respondent took objection in stating that it had never been argued in the ET1 or in the claimant's witness statement that he satisfied the statutory definition of disabled from 2011.

5. The tribunal adjourned to consider the matter and during the adjournment counsel for the claimant forwarded some further documentation to the Employment Tribunal. This comprised: -

   (i) A letter dated 10 July 2018 from the claimant to an HR administrator at the respondent referring to his contract of employment and alterations he would like to it before signing it.

   (ii) An Equal Opportunities Monitoring Form on which the claimant had ticked the box stating he considered himself to have a disability and he had handwritten "Pins and plates in my spine". This document was not signed or dated.

   (iii) A document which appeared to be a photocopy of the address label to an HR administrator but was not evidence of the date of posting as there was nothing on it to indicate the date it was posted and it had not been franked or stamped in any way.

6. Counsel for the claimant sought to suggest that this was relevant evidence from the claimant that he considered himself a disabled person as a result of his previous operation. It was, she also submitted, further support for the main argument that he was disabled from 2011. It appeared to the tribunal that counsel and the claimant were confusing the issue of whether

the claimant was disabled with whether the respondent had knowledge. The monitoring document however did not assist with the issue of knowledge as it was not dated.

7. The respondent's representative took instructions and informed the tribunal that the Equal Opportunities Monitoring Form is completed and returned anonymously and consequently the respondent cannot say when it was returned to it. It may have been at the outset of employment or a later date. In any event the respondent submitted that this was a late application to amend the claim about which there was nothing in the ET1 and the Impact Statement.

8. Counsel submitted that although the Equal Opportunities form may not be dated it is the claimant's case that it was sent with the letter in the envelope arguing that it is clear they were all sent together.

The tribunal's conclusion on this issue

9. The tribunal was not prepared to allow in these late documents. It was not clear how they would assist the tribunal as it could not be assumed that the Equal Opportunities Monitoring Form was the same date as the claimant's letter. The respondent was at a considerable disadvantage by the late disclosure particularly bearing in mind that it had no way of ascertaining now when and if the form had been received by it.

10. With regard to the suggestion that the claimant was disabled from 2011, that had never been part of the claimant's case and it was too late on the first morning of the hearing to seek leave to amend. Very clear orders were made at the last hearing, at which the claimant was represented, as to what was required in the claimant's Impact Statement. Order 2.2.4 asked the claimant to make clear when the alleged substantial and adverse effects started and stopped. If the claimant believed that his disability started in 2011 it was incumbent upon him and those representing him to make sure that that issue was covered in his Impact Statement which it is not. There is nothing in that statement to indicate that the claimant was asserting that his back condition had a substantial and adverse effect on his ability to carry out normal day to day activities at any time before his operation in 2019. The claimant will therefore be confined to the case as pleaded arguing that disability commenced in 2019 after his operation.

11. Evidence was heard from the claimant and from the following on behalf of the respondent:

    Thomas Ross Williams, Managing Director of the container division,
    Adam James, Driver Administrator and
    Paul Rose, National Account Manager of the respondent.

12. The tribunal had a bundle of documents of approximately 286 pages. From the evidence heard the tribunal finds the following facts.

The Facts - Disability

13. The claimant sustained a broken vertebrae to his back as a following an accident in South Africa in 2011. He refers in his Impact Statement to surgical interventions between 2014 to 2017 but the tribunal had no further details of those and neither did it have any information about the effect of the broken vertebrae on the claimant's normal day to day activities during that period.

14. The tribunal saw a letter from Mr Khalid Salem, Consultant Spinal Surgeon of the 10 July 2019 confirming the "pre op assessment" that had taken place on 26 June 2019. This set out the plan for the claimant's surgery and the risks that this carried. The operation was to be in two stages.

15. The surgery took place at QMC Nottingham on 15 and 17 July 2019. The claimant was discharged on 24 July 2019. In the discharge summary the details of the procedure were confirmed, and it detailed how the claimant had been on the high dependency unit for 3 days and had progressed well post-operatively and had then been moved to the ward. He had engaged with physiotherapy and progressed well. He was to be reviewed in an outpatient appointment in 6-8 weeks.

16. On getting back home after the operation the claimant was dependant on his wife for his personal care needs. It took about 6-8 weeks before he could walk up and down stairs un-aided and about the same period before he could venture outside and only then for very short distances. In those first weeks his wife had to help him with walking up and down stairs, getting in and out of bed, washing and shaving, going to the toilet, getting dressed and undressed and getting in and out of bed.

17. On 2 October 2019 the claimant had his first post-operative consultation which Mr Salem confirmed in a letter dated 17 October 2019. He stated that the claimant was "doing really well", he still got spasms in his back but was managing to walk quite frequently. His pain was settling but he still had pain around what "I believe is a muscle tear post-operatively in the right para spinal exposure. I believe this will settle down.". The X-rays taken on that day were very satisfactory. He arranged for the claimant to re-attend in 4 months' time with a whole spine X-ray on arrival.

18. The claimant gave evidence that on or about 5 November 2019 he was issued with a blue badge.

19. By the end of the year the pain had increased, and the claimant was finding it more difficult to walk. He still needed his wife's assistance with personal care needs. He needed help dressing and tying and untying his shoelaces. He was uncomfortable sitting, standing, and walking and so had to switch between them to try and manage the discomfort. His mobility was poor. Because of the pain in his spine, he was and was still at the date of the Impact Statement (signed 13 August 2021) battling to get

a decent nights sleep. He was able to drive for short distances and periods of time.

20. The claimant attended a meeting with the respondent in January 2020 (page 160 of the bundle). He is recorded as still feeling quite debilitated and the tribunal does not find that inconsistent with the account given in his Impact Statement.

Occupational Health Report – 10 December 2019 (page 140)

21. At the beginning of this report was detailed the referral that was made and the questions that were asked of the Occupational Health Physician. These included whether the claimant was disabled within the meaning of the Equality Act and if the duties in his substantive role were no longer possible would there be a recommendation for re-deployment to alternative duties in some capacity.

22. Dr Miller, the Occupational Health Doctor stated:-

> "He was advised by his spinal surgeon that the goal is that the vertebrae will all fuse post-operatively which can take anything between 6-12 months. At present Kenneth is making reasonable progress. He is in less pain than immediately post-operation and is gradually reducing his opiate pain killers however he is not ready to return to work at present."

23. It was recorded he was extremely restricted in his movement. He could not walk for prolonged periods of time or lift. Sitting in a vehicle could be very uncomfortable particularly when going over bumps. By the claimant's own admission, he was not fit to return to work. The Occupational Health Doctor continued:-

> "Both he and his spinal surgeon are optimistic that he will make a good recovery and return to his present role of an HGV driver in due course. At the moment the projected return to work date is hopefully March 2020 however this remains an educated guess as it depends on the rate of fusion of his wired vertebrae."

24. At the time of writing that report it was not considered that the claimant met the definition of disabled under the Equality Act 2010. The Occupational Health Doctor stated he hoped that the impairment was temporary and that by Spring 2020 the claimant should be able to return to work.

25. On 12 February 2020 the claimant had his second post-operative consultation (page 264). Although the clinic took place on 12 February 2020 the letter was not sent until 6 April 2020 b which time of course the country was in the first national lockdown due to the global pandemic. Mr Salem recorded that the claimant was struggling with pain describing the current situation as:

> 'Pain in the mid-lumbar area that has become worse over the course of the last three weeks – plus a right sided paraspinal pain under investigation'

Having come to know the claimant quite well he believed his pain to be 'substantial' and he had therefore organised an MRI scan and a CT scan. These did not happen due to the lockdown. The report also stated the claimant would benefit from physiotherapy.

26. On 13 February 2020 the claimant underwent a hernia operation.

27. On 11 February 2020 the claimant was signed off sick until the 2 May 2020.

28. The claimant attended a capability meeting with Adam James on the 11 March 2020 to which further reference will be made below. At that meeting the claimant explained that when he last saw his consultant (on 12 February as above) he had explained to him that he was 'not feeling fantastic' and the consultant had expressed the view that he had expected him to have been a lot better by then. He reported how a CT scan and MRI had been requested. The claimant was to return to see him on 6 June 2020 but there had been talk with the consultant of a possible return to work on 1 June but nothing definite agreed until the results of the scans had been seen.

Relevant Law

Disability

29. The claimant must satisfy the tribunal that his back condition amounted to a disability within the meaning of s.6 of the Equality Act 2010 this provides as follows:-

> "**6 Disability**
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.
>
> (3) In relation to the protected characteristic of disability—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect."

30. The tribunal must have regard to Schedule 1 to the Act which provides at s.2:-

"*2 Long-term effects*

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

31. The Schedule also deals with the effect of medical treatment at s.5 as follows:-

"*5 Effect of medical treatment*

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect."

32. In considering disability the tribunal should have regard to the Guidance on the Definition of Disability (2011), this deals at section C3 on the meaning of likely and then provides at section C4:-

> "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age)."

The Tribunal's Conclusions on disability

33. It was discussed with the representatives and there was no dispute that the tribunal must assess disability at the date of dismissal which was 31 March 2020. Documents that come after that date are not relevant to the tribunal's determination.

34. In considering whether the substantial adverse effects were likely to continue for 12 months or more this is tantamount to asking whether they "could well happen" and the tribunal finds that that was the case here. In the letter from Mr Salem following the February 2020 consultation it was clear the claimant was still suffering substantial pain the cause of which needed to be investigate. This was made clear to Adam James at the meeting in March 2020. The notes record that he stated that he was still waiting for the scans. Even if they had been carried out in June or earlier as he had hoped they were only scans and the consultant would still have needed to advise on further treatment to relieve the pain the claimant was still suffering from.

35. The tribunal must also take account of the fact that without the painkillers the claimant was taking his pain and discomfort would have been even greater.

36. With regard to knowledge under s.15(2), in an email of 5 September 2019 (page 105) it was clear to the respondent that the claimant considered himself disabled. In that email the claimant stated to Tom Williams that communications with HR with regard to his contract were still outstanding and went on:-

> "Could you please ask them to re-post it to me for signature and also the form concerning disability, because after my op I can now contribute towards the number of staff with disabilities employed by Maritime."

37. The respondent was then alerted to the fact that the claimant was thinking that he was disabled.

38. Although Occupational Health stated they did not think he was disabled in 2019 that was clearly stated to not be "at the present time" and there was still the possibility that he could be later on.

39. Section 15(2) also contains the words whether the respondent "ought reasonably to have known". This tribunal is satisfied that the respondent ought reasonably to have considered in March 2020 what it had been told by the claimant. Adam James accepted that Shaun from HR had said that the claimant might be disabled. They cannot therefore seek to argue that they did not reasonably know in March 2020 that the claimant might satisfy the definition of disabled under the Equality Act 2010. The claimant had undergone a substantial operation and had continued to report to the respondent that adverse effects it was having on his day to day activities and that despite a good recovery initially he was continuing to suffer significant pain. The respondent ought reasonably to have known that the claimant was disabled under the Equality Act.

Findings on substantive issues

40. On 10 August 2019 the claimant emailed Adam James querying sick pay. He was concerned that his last payslip showed he had only been paid SSP and he thought that he would qualify for company sick pay. Mr James agreed to speak to payroll.

41. Adam James wrote to the claimant on 6 August 2019 in relation to an alleged tacograph infringement which needed to be investigated. They needed to hold an investigatory meeting whilst the claimant was absent from work and asked that he provide dates and location that would be convenient. This is not relevant for the issues before this tribunal but in any event as Adam James stated at paragraph 13 of his witness the matter was subsequently considered closed by the respondent with no formal action taken.

42. By email of the 23 August 2019 Adam James advised the claimant that the company had taken the decision not to pay company sick pay. The claimant escalated his concern about this and by email of the 5 September 2019 Tom Williams confirmed that the decision had been reconsidered and the claimant would be allocated company sick pay for a period of 3 months, when a further review would happen.

43. On 29 November 2019 Tom Williams was informed by HR had the 3 month discretionary sick pay he had authorised by paid to the claimant was coming to an end. Mr Williams approved a further one month. This was confirmed to the claimant by letter of the 12 December 2019 with the payment continuing at £300 per week until the end of December 2019.

44. Mr Williams approved a further extension of discretionary company sick pay until 17 January 2020 and this was confirmed by Adam James in his

letter to the claimant of the 20 January 2020. It is understood that from then the claimant was not in receipt of any pay from the respondent.

45. Adam James and the claimant had an email exchange on the 5 September 2019 on Adam James return from holiday. The claimant advised him that he was not driving as 'my legs and arms are still numb'. He could not start physio for another 5 weeks.

46. The claimant remained on sickness absence. In November Adam James had email discussions with HR about the continuation of the claimant's discretionary sick pay. He was concerned as the claimant was one of two drivers employed to operate an HGV from a remote site on a customer's premises. With the claimant off the respondent had to utilise drivers from other depots on either overtime shifts or cover when they could. They were frequently paying another driver £68 per week in travelling expenses to cover the claimant's duties. Further if no cover was available the vehicle would be left standing idle at an estimated cost to the business of £250 per day plus lost revenue. The tribunal saw no documentary evidence to substantiate any of these costs.

47. Adam James decided to commence the procedure under the respondent's Sickness Absence policy. By letter of the 21 November 2019 the claimant was advised that his absence was to be reviewed and his permission sought for medical information. The claimant signed and returned the forms consenting on 25 November 2019.

48. In an email of the 13 December 2019 the claimant advised Adam James that he was driving a bit but that 'every time I hit a bump it goes right through me'.

49. The occupational health report was dated 10 December 2019 and has been referred to above. By letter of the 23 December 2019 the claimant was invited to a meeting the respondent having received the Occupational Health report of 10 December 2019. The meeting was scheduled for the 15 January 2020 and the claimant advised of his right to be accompanied. The meeting was conducted by Adam James and a transcript was seen at p160 of the bundle. The claimant was due to see his consultant on the 12 February and it was hoped that the claimant would be able to share his report by the 28 February 2020. It was explained that if the claimant was not able to come back they would have to consider capability and 'we won't be able to keep the position open'.

50. The outcome of the meeting was confirmed in a letter to the claimant of the 20 January 2020. This referred to reviewing the position at the end of March 2020.

51. On 11 February 2020 the claimant was signed off sick until the 2 May 2020.

52. By email of the 24 February 2020 the claimant advised that his consultant wanted him to have a further CAT scan and MRI and see him again on 13 May to discuss the results. By the 28 February the claimant had not had the consultant's report but stated to Adam James in an email of that date that his 'best guess' for a return date was the 1 June 2020.

53. By letter of the 4 March 2020 the claimant was requested to attend a capability review meeting on 10 March 2020. He emphasised that they may have to consider whether the claimant's employment could continue, and that consideration may be given at the end of that meeting to termination.

54. The notes of that meeting were in the bundle at page 188. The claimant recounted to Adam James that he had discussed with his consultant a possible return to work date of the 1 June 2020, but nothing had been confirmed in the absence of the scans required. This was at the time of the first national lockdown. The claimant explained that he had another appointment on 6 June 2020 with the consultant.

55. At the conclusion of this meeting Adam James is noted as stating to the claimant that business had

> '…slowed down but it will slow down this time of year anyway. Well obviously you know the busiest time of the year but the position's open anyway. As we sit here today in this office, this room, your position is still open and it's yours…'

56. After the meeting Mr James had extensive discussions with Shaun McConnell of HR recounted at paragraphs 26-30 of his witness statement. It is in those paragraphs that he gave evidence that they did discuss whether the claimant might be considered disabled under the Equality Act. Mr James concluded that he was not. Following these discussions the decision was taken to dismiss the claimant. The tribunal did not hear from Mr McConnell.

57. Adam James telephoned the claimant on 31 March 2020 to advise him of his decision to dismiss. He accepted that the claimant said to him on the phone that he was just about to call him to discuss a possible return to work.

58. By letter of the 31 March 2020 Adam James confirmed the termination of the claimant's employment. He had reached the decision that because of a lack of a clear sign of a return to work date, he had to terminate the contract due to incapability on ill health grounds. Mr James acknowledged in cross examination that at the time of dismissal the claimant was not receiving any sick pay.

59. The claimant submitted his appeal by letter of the 2 April 2020 stating he had been shocked by the decision and had been working towards returning on 1 June 2020. He also thought that no decision would be taken before a year was up particularly as he had informed Adam James of a 6 to 12 month recovery and that the respondent had a 12 month

company sick pay scheme and it had come as a surprise to have his employment terminated at 8 ½ months (from the date of his operation).

60. The claimant's appeal was heard by Paul Rose on the 27 April 2020. The transcript was seen at page 209 of the bundle. The claimant restated his argument set out in his appeal letter that as the respondent had a 12 month sickness policy in place he had believed that 'it would be a 12 month time period before any decision on termination of contract was sort of even considered'. He confirmed in cross examination that he didn't assume he would be paid for 12 months but that he would not be dismissed for 12 months. He claimed that he had been about to start discussions about a staged return to work. The claimant accepted in evidence that he was still at the appeal stage not able to give a date for his return to work. His focus at the appeal was the dismissal being within 12 months of his operation.

61. Paul Rose indicated he was not going to make a decision that day but review and consider that position. He confirmed his decision not to uphold the appeal in a letter of the 6 May 2020. He emphasised that the sick pay scheme was subject to management discretion and that the continuation or not of discretionary payments under it did not preclude decisions with regard to an employee's capability to do the job or on the prognosis for a return to work.

62. The claimant accepted in cross examination that he was still unfit to drive an HGV but also stated he had not tried to do so. He clarified that he does not think he is fit enough as he cannot twist or turn to drive safely. The work he has obtained is driving but not an HGV. He obtained part time work in or about October/November 2020.

63. The claimant further explained in evidence that his rehabilitation has been held back by the pandemic. The operation that he needs should have been carried out in early 2020 but could not be as he would have needed to be in intensive care. As at 13 August 2021 when the claimant signed his impact statement he was still waiting for a date. The claimant acknowledged that because of this he was still incapable of working as an HGV driver. The claimant confirmed that he would have resigned his employment with the respondent if he was still unable to do his job after the 12 months had expired.

64. The claimant explained in answer to a question from the judge that he envisaged a staged return to work could have involved him sitting in the passenger seat for a day with one of the drivers to see how he coped with being bounced around but not in control of the vehicle. If he got through that he could potentially have driven with a driver trainer with him and then by himself, if that was successful, a couple of days a week.

65. The claimant had a telephone consultation with Mr Saleem on the 4 June 2020 when it was confirmed that he had not had the investigations required and continued to struggle with the same symptoms which had not

altered since their last appointment. The claimant was reviewed again on 30 September 2020. Mr Saleem explained in a subsequent letter to the claimant's doctor that the CT scan showed no evidence of the metal work loosening. The claimant did however have what appeared to be a non-union across the L2/3 disc space with a small but detectable gas shadow above the cage at that level. He felt that they needed to investigate the possibility that the non-union at L2/3 is the reason for the pain.

66. In the bundle the tribunal saw the respondents accounts for the year ending December 2020 showing a £10.4 million profit for that year and increase from £7.3 million the previous year.

Relevant Law

67. The only claim brought under the Equality Act is a claim under s.15. This provides as follows:-

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

68. The respondent in this case accepted that the claimant's dismissal amounted to unfavourable treatment. The issue for this tribunal therefore is whether that can be justified. As the Code states at paragraph 5.12:-

> "It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."

69. To be proportionate the conduct in question must be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (Chief Constable of West Yorkshire Police & Another v Homer [2012] ICR 704 SC and Allonby v Accrington and Rossendale College & Others [2001] ICR 1189 CA). Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer. It will be relevant for the tribunal to consider whether any lesser measure might nevertheless have achieved the employer's legitimate aim. The severity of the impact on the employer of the continuing absence of the employee who is on long-term sickness absence will be an element in the balance that will determine the point at which their dismissal becomes justified.

70. The time at which justification needs to be established is when the unfavourable treatment in question is applied. When the putative

discriminator has not even considered questions of proportionality at the time it is likely to be more difficult for them to establish justification.

71. The Code makes reference to the relevance of reasonable adjustments and provides at section 5.20:-

> "Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments."

72. Section 5.21 provides:-

> "If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment it will be very difficult for them to show that the treatment was objectively justified."

73. The Code also makes it clear (4.29) that:-

> "Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination."

74. Even if the aim is a legitimate one the means of achieving it must be proportionate. That involves a balancing exercise by the Employment Tribunal (paragraph 4.30).

75. The close connection which exists in practice between a failure to make reasonable adjustments and objective justification was acknowledged in the case of Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA when LJ Elias said:-

> "An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and, if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified."

Conclusions

76. There is no doubt that the claimant was treated unfavourably by being dismissed and that this was because of something arising in consequence of his disability contrary to the provisions of s.15 of the Equality Act 2010. In closing submissions the respondent's representative did not seek to dispute this.

77. The issue therefore for this tribunal is whether within the meaning of s.15(1)(b) the respondent can show that the treatment was a proportionate

means of achieving a legitimate aim. It has not shown that to the satisfaction of the tribunal.

78. In the witness statement of the dismissing officer Adam James the justification was confined to deciding that "the expense, disruption and uncertainty that Ken's continued absence was causing to Maritime warranted terminating Ken's employment on capability grounds" (paragraph 31) and brief details at paragraph 14 of the costs of paying another driver. Whilst attempts were made at this hearing in the evidence to justify the dismissal the tribunal had no supporting evidence before it. None of the costs to which the respondent alleged it was put as a result of the claimant's absence were evidenced in any documents in the bundle. The tribunal also notes that the company as at the end of December 2020 was showing a £10.4 million pound profit for that year.

79. At the time of the claimant's dismissal he was not costing the respondent anything as he was not receiving any form of sick pay. There would therefore have been no cost to the business in retaining him until further medical evidence was obtained. In its ET3 response form the respondent stated it employed 2,500 people within Great Britain. Although Mr James gave oral evidence in cross examination about the fact that they had to pay another driver to cover the claimant's work whilst he was absent, not only was that not evidenced in any way in the documentation before this tribunal but it was not made clear how further payment would be necessary when employing that many employees.

80. Section 15(1)(b) requires there not to only be a legitimate aim but that the treatment be proportionate. The tribunal cannot accept that dismissing the claimant at that point in time was a proportionate response bearing in mind that he was not costing the respondent anything at that time. The respondent did not have an up to date report from OH or from the claimant's consultant who he was due to see again in June.

81. For all these reasons the tribunal has had to conclude that the claimant was treated unfavourably because of something arising in consequence of his disability and that unfavourable treatment has not been justified.

82. A remedy hearing has been listed as set out above. Case management orders are made in a separate document

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Employment Judge Laidler

Date: 10 March 2022

Sent to the parties on: 16 March 2022

For the Tribunal Office